**An Addendum**
**to**
**A Review of Police to Crown Disclosure Compliance – March, 2004**
**and**
**A Review of Crown to Defence Disclosure Compliance – July, 2004**
**in the**
**James Driskell Murder Trial and Appeal**
**by John J. Enns**
**December 2004**

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Subsequent to the completion and submission to the Minister of Justice of Manitoba of the two Reviews referred to above in March and July 2004, I received the following documents from Mr. Rob Finlayson, Assistant Deputy Attorney General, with a letter dated November 4, 2004, namely: –

> "*1. Investigation Report prepared by Mr. David McNairn, Department of Justice Criminal Conviction Review Group dated August 26, 2004;*
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> *2. Response from Mr. James Lockyer et al dated October 19, 2004;*
>
> *3. Letter from Mr. James Lockyer to Mr. Bruce MacFarlane, Q.C. dated October 14, 2004;*
>
> *4. Memo from Mr. Dale Schille Senior Crown Attorney to Rob Finlayson dated November 4, 2004.*"

Following several brief telephone consultations, I next received the following letter from Mr. Finlayson dated November 5th, 2004, with the authorization and request which initiated this Addendum to the Reviews: –

> "*Dear Mr. Enns:*
>
> *RE: JAMES PATRICK DRISKELL*
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> *Further to my letter of November 4, 2004 I wish to confirm that Manitoba Justice would like to retain you to address the following questions:*

*Were you aware of and did you take into account the documents referred to in Mr. Lockyer's letter to Bruce MacFarlane, Q.C., the submission to Federal Justice and in the interim federal investigative report; if not, would the documents or any of them have changed your view or the contents of your report; if that is the case, can you prepare an addendum outlining the respects in which your report would have changed.*

*I am also attaching a copy of the memorandum dated November 5, 2004 from Mr. Dale Schille.*

*Thank-you for your usual co-operation.*

*Sincerely,*

*Rob Finlayson.*
*Assistant Deputy Attorney General"*

As I had only recently completed my research into the Crown files pertaining to Driskell, I was fairly well informed about the various issues involved, but nevertheless felt it prudent to again have access to that body of files, as well as my Reviews and notes, made during their preparation, in order to systematically compare and analyze all of this material in light of the documents recently received from Mr. Finlayson. In doing this, my task was to determine whether or not I had, at the time of preparing my Reviews, taken into account and been aware of the information contained in the recently received documents, and if not, would such information have changed the views which I had expressed in my Reviews?

By way of a general introductory statement, I found that the concerns raised in Mr. David McNairn's Investigation Report, Mr. James Lockyer's Response to the Investigation Report and his letter to Mr. Bruce MacFarlane, Q.C. dated October 14, 2004, are, (subject to certain aspects about which I will remark later), substantially those concerns to which I have alluded in one or both of my Reviews. In essence, therefore, I found nothing which would lead me to other conclusions than those which I had expressed in my Reviews.

A consideration of Mr. McNairn's Investigation Report shows a very thorough and factual report of all aspects of the case. Unlike my task when preparing my Reviews in which my duty was to focus only on what information in the possession of the police or the Crown which had not been disclosed to the Defence, Mr. McNairn outlined all the information, disclosed or not in his Report.

In his detailed and exhaustive 131 page Report, Mr. McNairn includes the documentation of payments or benefits paid to the Crown witnesses Zanidean and Gumieny. In the case of Zanidean, these total (including over $8000.00 paid his lawyer) $84,973.26. In my Review, I had summarized these more briefly as follows: –

> *"1. Not disclosed were the facts that this "provision of monies to help support", in the case of the witness Reath Zanidean, included the following:*

a. *For several months before and after the trial, assistance with mortgage payments on his home.*

b. *Assistance in the sale of his house in Winnipeg.*

c. *Monthly rent payments at two different locations to which he had been moved.*

d. *Moving expenses, telephone calls, motel accommodation, etc.*

e. *Substantial retainer fees to Zanidean's lawyer while under protection.*

f. *A lump sum settlement of $20,000.00 negotiated in December 1991, a year before his appeal.*

g. *That in total this support over a period of about a year amounted to in excess of $70,000.00.*

*All of these amounts are in addition to an undisclosed amount received by Zanidean from the Crime Stoppers program."*

And in the case of Gumieny, Mr. McNairn documents payments and benefits totaling $21,530.42. In my Review I indicate that I was unable to find actual documentation but did discover indirect references to payments and benefits made as follows: –

"2. *While the Crown files contain extensive records of bills, invoices and other charges paid by Manitoba Justice officials*

*to, or on behalf of, the witness Zanidean, there is only indirect and limited information about moneys paid to another important Crown witness, namely John Gumieny. That file appears to be missing. From what information that is documented about payments to Gumieny, the following facts were not disclosed to the defence:*

*a. Moving expenses to another city.*

*b. Monthly rental payments.*

*c. Moving expenses to a second city.*

*d. Some other undisclosed amounts.*

*These payments were in addition to the sum of $400.00 Gumieny had received from Crime Stoppers."*

In again reviewing Crown files, including the so-called "Administrative File", I was still unable to locate the documentation for payments to Gumieny, and am unable to explain how or from what source Mr. McNairn obtained the details of payments to Gumieny. This is the only factual information to which I did not have access while conducting the research for my Reviews.

Nevertheless, the non-disclosure of adequate information was clearly referred to at page #9 of my July 2004 Review, where I stated "*...it remains the fact that Brodsky, and subsequently the jury at trial, were only vaguely aware about the general extent of the financial assistance both Zanidean and Gumieny received*".

Therefore, subject to certain remarks I wish to make in dealing with Mr. Lockyer's responses, I see no reason to amend or alter the findings of my Reviews in relation to the matter of adequate disclosure of moneys and benefits paid to or on behalf of the two Crown witnesses mentioned.

The other non-disclosed matters referred to in Mr. McNairn's Report were all matters also covered in my Reviews, namely: –

(a) The Zanidean Telephone Call

(pages 22-24 in the March 2004 Review)

(b) Disclosure of Evidence Relating to Reath Zanidean credibility

(pages 10-21 in the July 2004 Review)

(c) Review of the Perry Dean Harder Murder Investigation

(page 13 in the March 2004 Review)

(page 6 in the July 2004 Review)

There is an area in Mr. McNairn's Report that gives me some concern. It is the reference to the fact that the Crown did not call Ray Wyant, then Senior Crown Attorney, to the stand to rebut Mr. Ian Garber's allegation that an arrangement had been made between him and Wyant that if Harder pleaded guilty, the property charges against Driskell would be stayed. Apart from Mr. Garber's evidence and a possible interpretation of Naomi Levine's remarks, the material in the Crown files discloses no indication one way or another of such an arrangement. That is why, in my July 2004 Review, I only briefly remarked on this at page 38, "*The fact that the Crown did not call Wyant as a witness, is purely in the prerogative of the Crown, and in no way implies wrongdoing*". With hindsight it may well have been a strategical error on the Crown's part, but that is another matter.

It should be noted as well that at the conclusion of his Report, Mr. McNairn carefully avoids expressing any views about possible motives, if any, of any police or Crown official where failures to disclose appropriate information occurred. Nor does he express in the Report any recommendation to the federal Minister of Justice, by stating simply: –

> "*The investigation report constitutes the factual basis upon which the Minister, in accordance with s. 696.3 of the Criminal Code, will decide whether there is a reasonable basis to conclude that a miscarriage of justice likely occurred in the applicant's case.*"

He goes on to state that the Minister will in due course also receive "a memorandum of advice" from him and from the Special Advisor, but these are not included in the Investigation Report.

I now wish to deal with Mr. Lockyer's Response to the Investigation Report and, as well, his letter of October 14th, 2004 to Mr. MacFarlane, Q.C.

Before commenting in some detail about his findings, I must point out the following: –

- That my Reviews examined disclosure compliance as it occurred at the time of the trial and appeal of the Driskell murder case in 1991 and 1992, not the issue of disclosure compliance in the years shortly before Driskell's bail application in 2003.

- That, to my knowledge, Mr. Lockyer has not seen my July 2004 Review, it having not yet been released. The March 2004 Review had been released and I presume he has seen that one.

In Mr. Lockyer's Response to the Investigation Report, he relies on three main areas of concern, namely: –

> "*(1) further information regarding consideration provided to Mr. Zanidean in exchange for his testimony.*

(2) *further information regarding consideration provided Mr. Gumieny in exchange for his testimony, and other information regarding Mr. Gumieny.*

*As well, the 1992 and 1993 correspondence from Saskatchewan Justice, and its fall-out within Manitoba Justice, only became available to the Applicant after the filing of the Memorandum of Argument on his release application.*"

Each of these three issues are dealt with in my Reviews and what is added are more details regarding the financial benefits accorded to Zanidean and Gumieny. Excepting for the financial details regarding Gumieny, which, as I have already stated (and stated in my Reviews as well) I could not find in the Crown files. The extensive correspondence as between Zanidean, or his counsel, Winnipeg Police officials, the R.C.M.P. and Manitoba Justice, was intact in the Crown's Administrative File, and which, in due course, was also submitted to Mr. McNairn's office. Several letters or memos from that file appear as photocopies in other Crown files as well.

What I had found troubling in my Reviews was that almost no details of the financial support were disclosed, and at trial no effort was made to correct the impressions left by the witnesses that their assistance was very minimal. The details, which I had not listed, would have become known, as well as the on-going negotiations with Zanidean's lawyer and Gumieny, had a more appropriate degree of disclosure occurred. In summary, then, while

Mr. Lockyer has quoted letters and memoranda about the details of the witness protection arrangements, the substance of all of these were dealt with seriously in my Reviews.

In this regard, my research lead me to the conclusion that when witness protection arrangements were made in those years – the early 1990's and before, that once a decision had been made to arrange witness protection, its implementation, the actual negotiation and arrangements for payments, were carried out by officials other than the trial prosecutors whose prime responsibility was to arrange and carry the Crown's case at trial. Mr. Lockyer seems to feel that

> "*If the trial Crowns did not know about Manitoba Justice's dealings with Mr. Zanidean, it could only be explained by the senior officials in Manitoba Justice creating a veil of deniability by design between them and the trial Crowns.*"

This, of course, is a very troubling allegation and in view of the proven failure to provide full disclosure about the benefits paid to the witnesses, needs very careful attention. That there was little communication between the trial prosecutor and those Justice officials involved in the witness protection arrangements is evident from the very infrequent record of communication between them about this. That there was a general awareness of the arrangements by the trial prosecutor is without question. Again, it is in the detail that information is lacking. This lack of detailed knowledge may, to some extent, explain why Zanidean's assertions that his support was minimal was not corrected in re-examination by

the prosecutor at trial, however it remains my view that a duty to re-examine on this matter ought to have occurred.

However, in my view, the situation as I have found it, does not mean that it "*could only be explained by senior officials in Manitoba Justice creating a* ***veil of deniability by design*** *between them and the trial Crown.*" The situation could as well be explained by any one of the following or a combination of any of them, namely: –

- a lack of communication between senior Justice officials and the trial prosecutor.

- a concern that the disclosure of the correspondence pertaining to negotiations about witness protection arrangements with the solicitor for the witness may violate client/solicitor privilege.

- a fundamental difference of opinion between officials as expressed in a response from Mr. Bruce Miller, then Director of Prosecutions Winnipeg in saying that how much information should be disclosed regarding witness protection information "calls for a subjective opinion which may differ significantly amongst different people".

- an ill-advised attempt at protecting or shielding a witness.

Wrong as all of these possibilities may be, they do not necessarily, singly or cumulatively amount to a conspiracy or a "design" to withhold information as a departmental policy.

I have indicated at the outset that the concerns raised by Mr. Lockyer were substantially those to which I had alluded in my Reviews, however, in one very important matter my report is inadequate. I had seen the correspondence between Mr. David Kovnats, Zanidean's lawyer, and officials of Manitoba Justice, but did not point out, as Mr. Lockyer rightly does, how substantial and how closely before his being called to testify these negotiations were. I am referring to Mr. Kovnats' letter to Mr. Bruce Miller dated June 4, 1991, and Mr. Miller's memorandum to Mr. M. A. Pereault dated June 10, 1991, in which he confirms arrangements having been concluded with Mr. Kovnats, this being during the actual course of the trial which had begun on June 4th, and Zanidean being called to testify on June 11th, 1991. The proximity of the negotiations and the extent of these negotiations clearly should have been disclosed. It is significant, and in keeping with departmental practice at that time that throughout the making of the witness protection arrangements and actual payments – that all these matters were carried on, not by the trial prosecutors, but other senior officials. However, I was unable to discern any plan, overt or otherwise, to subvert this information.

The other matter Mr. Lockyer refers to is what I have called the "Swift Current correspondence" in my Reviews. My Review describes this in considerable detail and I have found nothing new in Mr. Lockyer's Response or letter of October 14th, 2004. It is common

ground that the information should have been disclosed as soon as it was first received in January, 1992. Mr. Lockyer raises the same questions which I did, and they remain as unanswered as when my Review was submitted.

In Mr. Lockyer's letter to Mr. MacFarlane, Q.C. he lists many documents in the 17 volumes of papers he had received from Mr. McNairn's office, as matters never before disclosed to him earlier by Manitoba Justice officials or the Winnipeg Police Service. As I have indicated at the outset of this Addendum, my work in preparing my Reviews was exclusively directed at what happened in 1990 to 1993.

Regarding the allegations that a number of matters found in the 17 volumes of documents Mr. Lockyer obtained from Mr. McNairn's office had not been received from Manitoba Justice before the bail application in November, 2003, I have reviewed two memos from Mr. Dale Schille dated November 4th and 5th, 2004. I was, of course, not present nor did my research review those meetings and or any correspondence which may have followed. However, when examining the contents of the "Fresh Evidence Materials" volume filed by Mr. Lockyer in conjunction with his bail application, I found a number of items which were obviously photocopies of items in the Administrative File. This is the same file which also contained all of that correspondence relating to the Zanidean witness protection arrangements which Mr. Lockyer indicates he had not received before the bail application. I am unable to explain this. The Administrative File is more than three indices thick. Were certain items overlooked when Mr. Libman and Mr. Schille perused the file and chose items for copying at

a meeting between them in the summer of 2003, well before the bail hearing in November? Was an assumption made that some of the items of information not so obtained were simply not requested because of a mistaken belief that such information had already been obtained along with other information from Mr. Greg Brodsky, Driskell's former counsel? I can make no finding on this issue, however can say that when I first commenced my research into the whole issue of police/Crown disclosure compliance, only days after the bail application, that the Administrative File then contained all of the correspondence about Zanidean's witness protection arrangement, and that furthermore, throughout my work, I was accorded what I believe was full and complete access to all files and documents in the Crown's possession.

These remarks conclude my findings and this Addendum.

Respectfully submitted this 1st day of December, 2004.

John J. Enns